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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 762

MARY HELEN BURTON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No.

MARY [redacted]EN BURTON,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered November 16, 1959.

Opinion Below.

The opinion of the Court below (App. A) is reported at 272 F. 2d 473.

Jurisdiction.

The judgment of the Court of Appeals (App. B) was entered on November 16, 1959. A timely petition for rehearing was denied on January 7, 1960 (App. C). The time to file this petition of certiorari was extended to March 6, 1960 by order of Mr. Chief Justice Warren dated February 4, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. Sec. 1254(1).

Questions Presented.

(1) Whether a decision which holds that one has no standing to move to suppress evidence illegally obtained or to object to its introduction into evidence at the trial, when the government's own uncontroverted evidence shows one having direct and immediate personal possession of the item until after the arrest, contravenes the protection of the Fourth Amendment.

(2) Whether, when the government's own uncontradicted evidence shows direct and immediate personal possession of the items seized until after the arrest, a decision which, on one hand, holds such governmental evidence sufficiently establishes possession to sustain a conviction under 21 U. S. C. Sec. 174; and, on the other hand holds the same government evidence does not sufficiently establish possession to give one a standing to move to suppress the evidence by motion or to object to its introduction into evidence at the trial, offends the due process clause of the Fifth Amendment or violates a civilized standard of fair play.

(3) Whether a decision which holds that evidence was abandoned and that there was no search and seizure, so that one had no standing by motion to move to suppress evidence illegally obtained or to object to its introduction into evidence at the trial, when the record shows that an illegal governmental act shook forth the fruit and caused the dropping of the evidence by a person who was illegally arrested, violates the Fourth Amendment and

the due process and self-incrimination clauses of the Fifth Amendment.

(4) Whether, under the rules of the right of an officer to arrest one whom he has reasonable cause to believe has committed a felony, a decision which assumes and holds that there was such probable cause when the sole evidence in the record was that the officer saw a man and a woman enter a garage apartment at night in a street, but not the location, where the officer has some general information someone was peddling narcotics, violates the Fourth Amendment.

(5) Whether, when it is established that an arrest without a warrant took place, a decision which assumes the existence of "probable cause" or justifying facts for the arrest without a warrant, upon their absence in the record in holding there was a valid arrest, violates the protection of the Fourth Amendment.

(6) Whether it violates the Fourth Amendment for a Court, on a motion to suppress evidence illegally obtained under Rule 41(e), or on the objection at the trial to the introduction of evidence illegally obtained, to put upon the movant or objector the duty of establishing the non-existence of justifying facts for the arrest without a warrant, rather than putting the duty upon the government to establish the existence of such facts.

(7) Whether, upon a motion to suppress evidence illegally obtained or upon objection to its introduction into evidence at the trial, where the record shows an arrest without a warrant, a decision which puts upon the movant

or objector the further burden of establishing the non-existence of justifying facts in the mind of the arresting officer, under penalty of assuming the existence of such justifying facts from their absence in the record, violates the due process clause of the Fifth Amendment.

(8) Whether it violates the Fourth Amendment for a Court to deny a motion to suppress evidence or to fail to sustain an objection to its introduction at the time of trial, when the record shows the evidence was illegally obtained by state officers who were specifically assigned to work with federal officers by an agreement of some three years standing between the departments, the persons were arrested for both federal and state offenses, the federal officer took custody of the evidence and the federal agent had the persons brought directly from the scene of the arrest to the Federal Narcotics Officers' Bureau for questioning precedent to a federal prosecution.

(9) Whether it violates the Fourth Amendment or the due process clause of the Fifth Amendment or the civilized standard of fair play to permit federal officers to use evidence in a federal prosecution which was obtained by state officers by an illegal arrest in which the federal officers were not technically present, when the evidence further shows that the officers who made the arrest were assigned to work with federal officers by an agreement between the state and federal departments, that the officers made the arrest for both federal and state offenses, and the federal agent met the arresting officers at the location of the arrest, took custody of the evidence, interrogated the arrestees at his own offices in the federal post-office building, and initiated a federal prosecution.

Constitutional Provisions and Statutes Involved.

The pertinent constitutional provisions and statutes are set out in Appendix D.

Concise Statement of the Facts,[1]

A. The Factual Basis of the Case.

1. INTRODUCTION.

This case presents fundamental questions of deep and broad significance in the administration of criminal law. Factually, the case is neither novel or unusual, being illustrative of a whole class of cases, and an established pattern of an enforcement activity in this district. The significance of the case lies in the pattern of enforcement activity involved and the novel standards applied to this conduct by the Court below. It is submitted if these standards and this pattern are to obtain then a procedure will be approved which crosses the line between proper and improper enforcement of the law, and will inevitably result in the radical errosion of basic constitutional protections.

2. FACTS RELATING TO THE ABSENCE OF A WARRANT OR PROBABLE CAUSE.

The officers who arrested your petitioner and her co-defendant had no warrant of any kind [Y. 40, 43].[2]

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[1]This statement of facts will only be concerned with Count 1 for petitioner was found not guilty of Count 2 [C. 13]. The proceedings before Judge Yankwich will be cited as Y., the Reporter's Transcript as R., the Clerk's Transcript as C., and Supplemental Clerk's Transcript as SC.

[2]Although the government never sought to justify the arrest, without a warrant, the decision of the Court of Appeals has assumed the existence of such justification. For this reason the above facts are set out.

Some seven to eight days before the arrest took place Officer Landry, the senior of three Los Angeles County Sheriff's officers who had been "assigned" to work with federal narcotics agents, [R. 57, 204][3], received some general information from an unspecified source[4] that a man was peddling narcotics in the "vicinity," [R. 92] on the "particular street" but not as to the "actual location" [R. 97] where the arrest took place. This information was conveyed to the other two officers "assigned" to work with the federal narcotics agents, namely, Gillette and Farrington, [R. 93] who were the officers ultimately making the arrest.

On the night of the arrest Officers Gillette and Farrington had been in the vicinity since 8:30 p.m. [R. 215]. At about 10:00 p.m. they observed an automobile containing petitioner and her co-defendant Stewart[5] enter a private driveway [R. 45] at 733 East 55th Street [R. 216, 217]. The officers observed these two persons leave the car and enter a garage apartment in the rear. After about 20 minutes the officer saw the two persons leave the apartment and return toward the car where, as they approached the car, they were arrested for both state and federal offenses [Y. 54, R. 349].

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[3]At another time in the proceedings the officers took the position that the word "assigned" was a poor choice of words [R. 201].

[4]The source of the information was never revealed nor its reliability in any way referred to in the proceedings. It was presented as merely unspecified general information.

[5]Petitioner had been previously convicted of a narcotic offense but there is no showing in the trial record that these officers were aware of that fact at the time when they made the arrest [C. 35-37].

3. FACTS RELATING TO THE ARREST AND TO THE SEARCH AND SEIZURE OF EXHIBIT 1-A.[6]

When petitioner and the co-defendant approached the car, Officer Farrington, who had a drawn gun [R. 232] yelled, "Police Officers. Stop." [R. 173, 175]. When the officer gave this command he was intending to effect an arrest [R. 224]. Petitioner submitted to his command [R. 231].[7]

After the officers had arrested petitioner and her co-defendant, the co-defendant made some "lunges" but was physically restrained by Officer Gillette [R. 224, 315] and the officers observed a small object [Ex. 1-A] fall to the ground from underneath the fingertip length coat of petitioner [R. 175, 230, 231, 290, 306].[8] Thereafter petitioner was ordered to place her hands upon the hood of the automobile and she was further personally searched. At the trial petitioner denied ownership of Exhibit 1-A, [R. 25] but she was never asked nor did she deny possession of the substance, except by plea. The government's evidence of her possession thus stands uncontroverted in the record.

Both persons arrested were then taken back to the garage apartment. The arrest occurred around 10:20 [R. 169]. At 11:10 to 11:15 p.m., Officer Farrington

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[6]Exhibit 1-A was shown to contain 88 grains of heroin, 38.4% pure [R. 142]. It was this substance which formed the exclusive basis of the prosecution in Count 1 of the indictment, of which your petitioner was convicted.

[7]It was stipulated to on the motions, which were in turn introduced at the trial, that the arrest took place as petitioner and her co-defendant approached the automobile [C. 54, R. 204-206].

[8]The police report states the substance was dropped from underneath petitioner's coat while she had her hands on the hood of the automobile, which places the event slightly later in point of time [R. 231, 290, 296, 332].

phoned Sgt. Landry's home, [R. 195] and at approximately 11:30 to 11:45 Sgt. Landry arrived with Federal Treasury Agent Richards. Officer Landry and Agent Richards then joined the group in the apartment [R. 194, 195]. At this time Agent Richards had the evidence delivered to him, [Y. 40] including Exhibit 1-A.

4. FACTS RELATING TO FEDERAL PARTICIPATION.

Pursuant to an "agreement" between the Sheriff's Office and the Treasury Department, [R. 198] Sheriff's Officers Gillette, Farrington and Senior Officer Landry had been assigned to work with the federal narcotic agents [R. 57, 204]. This agreement and cooperation had been in existence for some four years [R. 57] before the arrest, with the arrangements being that the county officers were on call to U. S. Treasury Agent Richards at all times [R. 60]. This particular group—U. S. Treasury and Los Angeles County Officers—"worked together all the time," as a rule, [R. 95] with the great majority of the cases being prosecuted in the federal court [R. 103]. Under this procedure the case at bar "would have been worked jointly" [R. 95]. In fact the arrest report in the case stated that the prisoners would be prosecuted for a federal narcotic violation in conjunction with the county officers [R. 294].

On the day of the arrest Officer Landry and U. S. Treasury Agent Richards had been together all day in Agent Richard's government automobile [R. 63, 69, 80, 109]. The arrest was made for both federal and state offenses [Y. 54, R. 349]. After the arrest was made Officer Farrington phoned Sgt. Landry's house and Sgt. Landry was brought to the scene by Agent Richards in his federal automobile [R. 69]. Agent Richards was given all the

evidence, including Exhibit 1-A. The prisoners were transported directly [R. 116] to Room 1755 of the Federal Post Office Building and were there interrogated by U. S. Treasury Agent Richards and the others [R. 195, 293, 404]. Thereafter, the prisoners were booked into jail for both federal and state offenses, [R. 352] although the evidence was kept in federal custody [Y. 40]. Subsequently, Officer Gillette arranged to have the state charges dismissed without prosecution [R. 354] and Agent Richards testified before the Federal Grand Jury when the case was presented as a federal case [Y. 48].

B. The Procedural Background.

The District Court has jurisdiction under 21 U. S. C. Sec. 174, 26 U. S. C. Sec. 7237(c), and 18 U. S. C. Sec. 3231.

Petitioner and her co-defendant were charged with violation of 21 U. S. C. Sec. 174 in a one count indictment, No. 25917 [S. C. 2]. A motion to suppress evidence illegally obtained was heard before Judge Yankwich and denied [Y. 1-55, S. C. 20]. At this particular proceeding petitioner established the absence of a warrant for arrest or search. The government in reply presented no evidence to justify the arrest, but relied solely on (1) petitioner's purported lack of standing to make the motion, and (2) the purported lack of federal participation and the so-called "silver-platter" doctrine. A further motion to suppress evidence illegally obtained was heard before Judge Westover and denied [R. 1-36, S. C. 25]. Again the government chose not to put on any evidence to justify the arrest without a warrant and rested solely on (1) petitioner's purported lack of standing to make the motion, and (2) the so-called "silver-platter" doctrine.

Thereafter a superseding indictment, No. 26268, was filed charging petitioner and her co-defendant with violation of 21 U. S. C. 174 in two counts.

A new motion to suppress evidence illegally obtained was made and denied in reference to this indictment [R. 45-130, C. 8]. On this motion the government offered no evidence of justification for the arrest without a warrant but chose to rely solely upon (1) petitioner's purported lack of standing to complain, and (2) the so-called "silver platter doctrine."

After trial petitioner's co-defendant was acquitted on both counts, and your petitioner was found guilty of Count 1 and not guilty on Count 2 [C. 13]. Count 1 exclusively related to the substance purportedly dropped from under petitioner's coat after she was arrested. It is this count which is now before this Court.

At the trial objections to the introduction of the evidence on the grounds of illegal search and seizure were preserved [R. 137, 139, 173, 174, 181] and all testimony taken on the motions was received into evidence [R. 204-206]. During the trial the government chose to offer no evidence to justify the arrest without a warrant and once more elected to rely upon (1) the "silver-platter" doctrine, and (2) petitioner's purported lack of standing to assert the motion.

Finally, upon the appeal, the government never argued that validity of the arrest but relied upon (1) the "silver-platter" doctrine, and (2) petitioner's purported lack of standing to make the motion to suppress or to object to the evidence being received.

Preliminary Statement in Argument.

In essence, the Court of Appeals held that a person in possession of a substance, who, after being illegally arrested, drops the substance, has sufficient possession to support a conviction under 21 U. S. C. 174, but not sufficient possession under the Fourth and Fifth Amendments to move for the suppression of the fruit of illegal governmental activity.

Although this decision is in direct conflict with *Williams v. United States*, 237 F. 2d 789, in the Circuit for the District of Columbia, upon the precise question, the Court below specifically declined to follow the *Williams* case.[9] Had the Court of Appeals stopped at this point, a relatively narrow problem would have been presented, namely, whether the search and seizure provisions of the Fourth Amendment and the due process and self incrimination provisions of the Fifth Amendment required settlement of the question by this Court in accordance with the decision in the *Williams* case.

Of course, two subsidiary questions would have been presented: (1) the question of federal participation, and (2) the constitutional propriety of the application, if there was found to be no federal participation, of the "silver-platter" doctrine applied to this pattern of enforcement activity.

However, the Court below did not stop at this point and attempted to distinguish the *Williams* case while at the same time, in apparent deference to a request by

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[9]The Court of Appeals in its opinion observed "We decline to follow the *Williams* case in this regard." (Slip opinion 5.)

appellee,[10] by-passed the questions of federal participation and the "silver-platter" doctrine. This attempt is, we submit, totally erroneous and presents important independent reasons for granting the writ as follows:

1. The Court erroneously concluded there was a valid arrest.

The applicable rules governing this arrest require "reasonable grounds" to believe the arrestee had committed a felony. Tested by these rules, there is a complete absence of probable cause. (The mere fact that at night a man and a woman are seen entering a private apartment located on a street where someone said a man is peddling narcotics, does not justify a reasonable man in believing a felony has been committed by these people.) In fact, so clear was the illegality of the arrest that the government has never once argued its validity, and has consistently elected to stand exclusively on other grounds in resisting petitioner's motions to suppress or exclude the evidence.

Yet in the face of this record the Court below, in direct conflict with the decisions of this Court, *assumed* the existence of probable cause by virtue of the absence

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[10]Appellee in its brief, at page 12, requests the Court to avoid a decision upon the silver platter doctrine as follows: "Appellee would be less than candid with the Court, however, if it did not admit that it would prefer to see this Court decide the instant case on either the ground that the instant heroin was abandoned or that appellant has no standing to complain of its seizure, or both. In view of the granting of certiorari in the aforesaid *Rios* case by the Supreme Court, it well may be that the long-settled rule of 'silver platter' may be cast aside by that Court.

"Moreover, appellee believes its arguments of abandonment and lack of status to complain have firmer basis in the record than its argument concerning the lack of cooperation between the agencies."

of such justifying facts in the record. The Court achieved this *volte-face* by placing upon petitioner, in direct conflict with the decisions of this Court on the subject, as well as with settled procedure on the hearings of motions to suppress, the burden of proving the absence of such probable cause. It is submitted the Court's conclusion of the validity of the arrest is unsupported by the record and presents grave federal questions and reasons for granting the writ.

2. The Court concluded there was no search and seizure.

The Court below, in direct conflict with the decisions of this Court and other Circuits on the same question, held there was no search and seizure of petitioner as the package or object was abandoned. In making this decision the Court chose to ignore the fact that the act was the direct consequence of a preceding wrongful government act; a compelled self-incrimination as it were, and that the government may not use the fruit of such illegal action. This holding by the Court of Appeals itself in turn presents additional federal questions and reasons for granting the writ.

REASONS AND ARGUMENTS IN SUPPORT OF THE GRANTING OF THE WRIT.

A.

The Court of Appeals, in holding that petitioner had no standing to make the motion to suppress the evidence and that there was no search and seizure of petitioner, has decided federal questions in direct conflict with the decisions of other Circuit Courts of Appeal on the same matter; has decided federal questions in conflict with the applicable decisions of this Court on the same subjects; and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

I.

THE COURT BELOW ERRONEOUSLY DEPRIVED YOUR PETITIONER OF RIGHTS GUARANTEED HER BY THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION IN HOLDING SHE HAD NO STANDING TO MOVE TO SUPPRESS THE EVIDENCE AND THAT THERE WAS NO SEARCH AND SEIZURE INVOLVED.

A. The Decision of the Court of Appeals That Petitioner Had No Standing to Complain of an Illegal Search and Seizure Contravenes the Fourth and Fifth Amendments to the Constitution.

The uncontradicted testimony of the government's own witnesses establishes that Exhibit 1-A was in petitioner's possession until it was seen to drop from beneath her coat after she was arrested. This gave petitioner standing to move to suppress the evidence.

In the case of *Williams v. United States* (D. C. Cir.), 237 F. 2d 789, in reference to a precisely similar set of circumstances, the Court observed,

> ". . . the unchallenged testimony of the prosecution showed that the capsules were in appellant's possession until he dropped them, *thus giving him standing to object.*" (Italics supplied.)

Accord: *State v. Dunivan*, 216 Mo. App. Rep. 548, 269 S. W. 415.

The Court of Appeals for the Ninth Circuit has specifically declined to follow the *Williams* case in this regard, and has asserted that petitioner had no standing to make the motion to suppress the evidence or to object to its introduction into evidence. In making this decision the Court of Appeals for the Ninth Circuit has relied upon cases dealing with houses, papers and effects and appears to have rested its determination upon the fact that petitioner denied ownership of Exhibit 1-A.[11]

It is submitted that the Court of Appeals has totally misconceived the protection accorded by the Fourth Amendment. The Amendment itself lists the things protected from illegal search and seizure. The first thing listed is the person. The things that follow are: houses, papers and effects. As this Court has observed, the Fourth Amendment's protection "marks the right of privacy as one of the unique values of our civilization," which extends "to innocent and guilty alike." *McDonald v. United*

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[11]The Court of Appeals at one time (slip opinion 5) states petitioner denied possession. In fact, petitioner was never asked and never denied possession except by plea. The government's evidence purporting to establish her possession was never controverted in the record and was found to be true by the trial judge [R. 438, 458].

States, 335 U. S. 451, 453, 93 L. Ed. 153, 157. What is more intimately associated with the right of privacy than one's own person? Are not papers, houses and effects a remove away from the hard core of privacy?

Clearly houses, papers and effects must be identified with the person as "their houses, papers or effects" to come within the protection, thus the necessity of a proprietary interest as to these subjects. But must one come into Court and allege ownership of their person when it is the person which is violated and aggrieved by a wrongful arrest, search and seizure? The cases interpreting the required standing to invoke the Fourth Amendment have consistently held that *either* possession or ownership gives one standing to complaint. See: *Scroggins v. United States,* 202 F. 2d 211; *Washington v. United States,* 202 F. 2d 214.

In researching this point petitioner does not find a single case where the government has ever contended that personal, immediate and direct possession was insufficient to give one standing to object. In fact, the cases would indicate the contrary: See *DeBruhl v. United States,* 199 F. 2d 175; *United States v. Walsh,* 89 Fed. Supp. 409.

It is submitted when a search of the person is involved, actual possession by the person gives one a complete standing to complain, irrespective of any allegation or denial of ownership in the substance upon the person. Such a conclusion is required to obtain the full force and impact of the Fourth Amendment guarantee as expressed by this Court. *Boyd v. United States,* 116 U. S. 616, 29 L. Ed. 746; *Bram v. United States,* 168 U. S. 532, 42 L. Ed. 468; *Weeks v. United States,* 232 U. S. 383, 58 L. Ed. 652; *United States v. Jeffers,* 342 U. S. 48, 92 L. Ed. 59; *McDonald v. United States, supra.*

The *Williams* case is decided in accordance with principles announced by this Court. The decision of the Court of Appeals in this case is in direct conflict with the *Williams* decision. A conflict upon a substantial federal question is thus presented which requires settlement by this Court.

B. The Decision of the Court of Appeals That Petitioner Had No Standing to Complain of the Illegal Search and Seizure Violates the Due Process Clause of the Fifth Amendment.

In this case petitioner is charged under 21 U. S. C. Sec. 174 with the unlawful receipt, concealment and transportation of a substance known to be illegally imported into this country. Under this provision necessary elements of the offense include: illegal importation in fact and knowledge of such illegal importation by the person accused.

In this case the government offered no evidence of either of these elements [R. 156-158] but chose to rest its proof of these elements upon a presumption arising from possession in the petitioner under the cases of *Yee Hem v. United States*, 268 U. S. 178, 184-185; *Stoppelli v. United States*, 183 F. 2d 391 and *United States v. Pinna*, 229 F. 2d 216. And see, 21 U. S. C. 174.

The sole evidence offered to prove petitioner's possession and sustain a conviction was the uncontroverted testimony of the officers that they saw Exhibit 1-A drop from under petitioner's coat after she was arrested. We ask, can the government, within the ambit of the due process clause, have *possession* for the purposes of a conviction, and assert upon the self same facts that petitioner has *no possession* to move to suppress the evidence? In short, can the government both have their cake

and eat it within the ambit of fair play, or any reasonable concept of ordered liberty and justice? We submit to permit such a result violates the due process clause of the Fifth Amendment under the criteria indicated by this Court in *Rochin v. California*, 342 U. S. 165, 96 L. Ed. 183, or the "fair play" standard used in *Galvan v. United States*, 347 U. S. 522, 98 L. Ed. 911.

Accordingly, if there is possession for one purpose there is possession for the other, and petitioner either has standing to move to exclude the evidence or the government has failed to establish possession sufficient to sustain a conviction. Moreover, if equality in the operation of these laws of evidence is not necessarily implicit within the minimal standards of "a concept of ordered liberty," *Palko v. Conn.*, 302 U. S. 319, 325, 82 L. Ed. 288, or within "a fundamental principle of liberty and justice," *Herbert v. La.*, 272 U. S. 312, 316, 71 L. Ed. 270, it is at least clearly required within the "civilized standard" by which this Court judges the administration of justice in the federal courts. *McNabb v. United States*, 318 U. S. 332, 87 L. Ed. 819.

C. The Decision of the Court of Appeals That Exhibit 1-A Was Not Obtained From Petitioner by a Search and Seizure Contravenes the Fourth and Fifth Amendments to the Constitution.

Not only has the Court of Appeals asserted that petitioner had no standing to move to suppress the evidence, having denied ownership, but the Court has also concluded there was no search and seizure, as the substance was abandoned.

This decision is in direct conflict with the holding in the *Williams* case. It is also in direct conflict with the case of *Work v. United States* (D. C. Cir.), 243 F. 2d 660, upon the same question. Moreover, this holding by the Court of Appeals is in fundamental conflict with decisions of this Court by ignoring the interplay between the Fourth and Fifth Amendments (*Boyd v. United States*, 116 U. S. 616, 29 L. Ed. 746) and the decisions of this Court which hold that the government may not reap legal fruits from illegal governmental activity (*Johnson v. United States*, 333 U. S. 10, 92 L. Ed. 436; *Silverthorne Lumber Co. v. United States*, 251 U. S. 385, 84 L. Ed. 319), or that the fruits of an illegal arrest cannot justify the arrest or justify the use of the evidence. *Johnson v. United States, supra; Agnello v. United States*, 269 U. S. 20, 70 L. Ed. 145; *Henry v. United States*, 28 Law Week 4015.

In analysis the decision by the Court of Appeals rests upon an attempted isolation or separation of the act of dropping from the preceding illegal arrest. We submit these are non-isolable acts and any attempt to separate them is arbitrary and unrealistic. As was said in *Work v. United States*, 243 F. 2d 660, 662, where there was an attempted disposal of evidence following an illegal entry.

> "Assuming that appellant placed the phial where it was found [in a trash can] it would be unacceptably naive to conclude that this attempt by her to hide it immediately following the presence of the officers in the hall, and that the finding of the phial

by the officers, were not direct consequences of their unlawful entry. The phial accordingly could not be used in evidence."

When the acts are thus viewed as one, clearly the wrongful governmental act produces the fruit; the arrest precipitates the dropping. In reference to the cases cited by the Court of Appeals, the *Work* case, where the government relied upon the same abandonment cases, is a decisive answer. In the *Work* case the Court said,

"None of the cases relied upon by the United States involved a situation where the original entry, initiating a search and leading to the securing of the evidence, was as here, an illegal entry into a private dwelling."

May we paraphrase: none of the cases cited by the Court involve the production of evidence by illegal process as in this case and in the *Work* case. Upon this serious question the decision of the Court of Appeals is in direct conflict with the decision in the *Work* case.

The *Work* and *Williams* cases are correctly decided. In them the relationship between the act of dropping and the preceding arrest is properly viewed in the light of the principles enunciated by this Court involving the intimate relationship between the Fourth and Fifth Amendments. See: *Boyd v. United States*, 116 U. S. 616, 613, 29 L. Ed. 746, 752, where this Court observed,

"We have already noticed the intimate relationship between the two Amendments. They throw great light on each other. For the 'unreasonable searches and seizures' condemned in the Fourth Amendment

> are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; in compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the Fifth Amendment, throws light on the question as to what is an 'unreasonable search and seizure' within the meaning of the Fourth Amendment."

The question thus posed is simple: may the state by an illegal act shake forth incriminating evidence from the victim, and yet assert there has been no search and seizure? We submit not, and the decision of the Circuit Court that there was no search and seizure contravenes the mandate of the Fourth and Fifth Amendments as interpreted by this Court. *Boyd v. United States, supra; Johnson v. United States, supra; Silverthorne Lumber Co. v. United States, supra; Agnello v. United States, supra; Henry v. United States, supra; McNabb v. United States, supra.* See also: *Nueslein v. District of Columbia,* 115 F. 2d 690; *United States v. Setaro,* 37 F. 2d 134.

The *Work* case is correctly decided in accordance with the principles announced by this Court. The opinion of the Court of Appeals is in direct conflict with the *Work* case. A conflict upon an important federal question is thus presented which requires settlement by this Court.

B.

The Court of Appeals by assuming and holding petitioner was not illegally arrested has decided federal questions in direct conflict with other decisions by the same Court on the same matters; has decided federal questions in immediate conflict with the applicable decisions of this Court on the same subjects; and has so radically departed from the usual and customary procedures on motions to suppress evidence illegally obtained as to call for the exercise of this Court's power of supervision.

II.

THE COURT OF APPEALS HAS ERRONEOUSLY DEPRIVED PETITIONER OF RIGHTS GUARANTEED HER BY THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION BY ASSUMING THE EXISTENCE OF PROBABLE CAUSE IN HOLDING THAT YOUR PETITIONER WAS LEGALLY ARRESTED.

A. Petitioner Was Arrested Without a Warrant of Any Kind and in the Absence of Any Justifying Excuse, Such as Probable Cause.

In this case the problem of *Henry v. United States*, 28 Law Week 4015, is not present for it was stipulated as a fact at the trial that petitioner was arrested when she approached the automobile. The stipulation accords with both the general and the California rules regarding arrest, in that there was a command ("Police officers. Stop.") to which petitioner submitted. See: *California Penal Code*, §835; Alexander, The Law of Arrest, p. 358; 6 C. J. S., Arrest, §1(b), pp. 571-572; 4 Am. Jur., Arrest, §2, p. 5.

The officers who arrested petitioner had no warrant of arrest or search. The arresting officers were Los Angeles County Sheriff's men who had been "assigned" to work with federal narcotic agents. Tested by applicable rules relating to the right to arrest without a warrant, the arrest was totally invalid and illegal. It makes no difference in making the above statement whether the rules of California Penal Code, Sec. 836 or the Federal rules of 26 U. S. C., Sec. 7607 are used, for both require the commission of a misdemeanor in the presence of an officer, or that the officer have reasonable cause to believe the person arrested has committed a felony.

When these standards are applied to the facts of this case, petitioner submits it cannot be reasonably maintained that the arrest was aught but illegal. In fact, so clear is this illegality that no evidence to justify the arrest without a warrant was ever offered by the government during the trial or motion proceedings, and the point was never urged by them upon the appeal.[12]

We submit the mere fact that a man and a woman drive to a private residence located on a street where supposedly some man is peddling narcotics, enter a garage apartment at night and thereafter come out, does not give an officer reasonable cause to believe these persons have committed a felony. In fact, a virtually identical

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[12]In appellee's brief in the Court of Appeals, on page 12, appears the following interesting comment, "No pattern of cooperation has been established whereby arrests are made by deputies without probable cause and the fruits thereof are turned over to federal agents."

set of circumstances have been held insufficient to give a reasonable officer cause to believe a felony has been committed by the Ninth Circuit Court itself. *Hernandez v. United States* (9th Cir.), 17 F. 2d 373. And see: 6 C. J. S., Arrest, §6, pp. 597-598, Note 92; 4 Am. Jur., Arrest, §48, pp. 32-34, Notes 10 and 14. See also: *United States v. Di Re*, 332 U. S. 581, 92 L. Ed. 210; *Johnson v. United States*, 333 U. S. 10, 92 L. Ed 436; *Giordanello v. United States*, 357 U. S. 480, 2 L. Ed. 2d 1503; *Henry v. United States*, 28 Law Week 4015. *Cf. Brinegar v. United States*, 338 U. S. 160, 93 L. Ed. 1879; *Draper v. United States*, 358 U. S. 307, 3 L. Ed. 2d 327.

On behalf of petitioner, the illegality of this arrest and the search and seizure was the subject of three motions to suppress evidence illegally obtained. The objections were renewed and preserved during the trial. The same objection was the pointed subject of the brief on appeal, being Argument I, and the essential core of that brief.[13] [See also: R. 71, 319, 447].

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[13]The Court of Appeals asserts that petitioner casually mentioned the lack of probable cause and refers to a sentence of appellant's brief in a footnote. The Court in the footnote only quoted a portion of a paragraph. The following is the remaining portion of the paragraph from which the Court deduced that petitioner casually mentioned the lack of probable cause: "There is not one iota of evidence in any of the record to conclude that the arresting officers had any information whatsoever connecting this Appellant with the commission of a crime. Whether tested by either Federal or State law, the arrest and search and seizure would be tainted with illegality. See generally *McDonald v. U. S.*, 355 U. S. 10; *Johnson v. U. S.*, 333 U. S. 10; *Trupiano v. U. S.*, 334 U. S. 699; *United States v. Lefkowitz*, 285 U. S. 454; *Blackford v. U. S.*, 247 F. 2d 745, 749 (C. A. 9th, 1957)."

B. The Court of Appeals in Holding There Was a Valid Arrest Has Deprived Petitioner of the Protection of the Fourth Amendment, Has Acted in Direct Conflict With the Applicable Decisions of This Court on the Subject, and Has Violently Contravened the Usual and Customary Procedures on a Motion to Suppress Evidence Illegally Obtained.

The Court of Appeals, without any discussion of probable cause at all, held there was a valid arrest by *assuming* the existence of justification for the arrest without a warrant. The reasons for the Court's assumption are stated in the opinion thusly,

1. "We note that there was no error specified relating to the lack of probable cause for appellant's arrest. While the question of lack of probable cause is *casually mentioned by both appellant and appellee the case was apparently tried on the assumption that probable cause for the arrest existed.*" (Slip opinion 4, emphasis added.)

2. "Here there was admittedly no warrant for arrest. But *lack of 'probable cause or 'reasonable grounds' for the arrest was not developed by appellant, if it existed at all.*" (Slip opinion 5, italics supplied.)

This assumption by the Court is totally erroneous. Specifically, the burden was *not* on appellant to show the absence of probable cause, but to show, *prima facie*, the illegality of the arrest. This burden is sustained once an arrest without a warrant is proved. *Thereafter, the burden is upon the government to show the presence of a justifying excuse for the failure to obtain a warrant.*

As was said by this Court in *United States v. Jeffers*, 342 U. S. 48, 51, 96 L. Ed. 59, 64, 72 S. Ct. 93,

> "Over and again this court has emphasized that the mandate of the Amendment [4th] requires adherence to judicial processes (citation). Only where incident to a valid arrest (citation) or in 'exceptional circumstances' (citation) may an exception lie, and *then the burden is on those seeking the exception to show the need for it.* (Citation.)" (Italics supplied.)

Thus upon the precise question of whether the burden was upon the appellant to show the "lack of 'probable cause' or 'reasonable grounds' for the arrest" as stated by the Court of Appeals, or whether the burden was upon the government "to show the need of it"; the opinion of the Court below is in direct and immediate conflict with a decision of this Court.

It is petitioner's position that the purport of the above quotation by this Court is that an arrest without a warrant presumptively contravenes the Fourth Amendment and such a showing establishes, *prima facie*, the illegality of the arrest. This interpretation would be consistent with the usual and accepted judicial procedure on motions to suppress. See: *United States v. Warrington*, 17 F. R. D. 25, 30, wherein the Court lays down basic guides for proceedings under 41(e) of the Federal Rules of Criminal Procedure. Rule 6 of these guides in the *Warrington* case provides,

> "The defendant will be required to support his motion by competent evidence that must make a *prima facie* showing that his motion has merit." (Italics supplied.)

If the language of this Court of Appeals remains uncorrected it will result, under the guise of a procedural device, in giving to law officers a virtual carte blanche. The danger of destroying procedural safeguards is not slight as this Court has observed on at least one occasion.

> "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States,* 318 U. S. 332, 347, 87 L. Ed. 819, 828.

This problem involves the gravest possible consequences to a free people. If the reasoning of the Court below obtains and this procedural device is permitted, so that a citizen is required not only to show the absence of a warrant but also to prove the complete non-existence of facts peculiarly within the arresting officer's mind in order to establish the illegality of an arrest, then we may as well reinstitute the general warrant and the writ of assistance. We submit that such a stealthy encroachment upon basic constitutional rights of citizens is to be prevented. *Boyd v. United States,* 116 U. S. 616, 635, 29 L. Ed. 746, 752; *Gouled v. United States,* 255 U. S. 298, 306, 65 L. Ed. 647, 651.

It is petitioner's submission that a proper settlement of this fundamental federal question is required by this Court to the end that the protections of the Fourth Amendment, the rules enunciated by this Court to implement that protection, and the decisions of this Court spelling out the burdens within those rules, shall not be evaded or erroded by the procedural sleight of hand involved in the decision of the Court of Appeals.

C.

The evidence being obtained by an illegal search and seizure, the failure to suppress it upon the motions and its use in evidence over objection contravenes the Fourth Amendment and constitutes a decision in direct conflict with the decisions of this Court and Circuit Courts of Appeal upon the same subject and so far departs from the accepted and usual civilized standards of judicial procedure as to call for correction under this Court's power of supervision, for there was federal participation in the arrest, search and seizure, or there was such a relationship between the state and federal officers as should preclude the use of the evidence by the federal government in a federal prosecution.

III.

The Conviction of Your Petitioner Was Obtained by the Erroneous Failure to Suppress and the Admission Into Evidence of Exhibit 1-A Which Was Obtained From Your Petitioner in Violation of the Fourth and Fifth Amendments by an Illegal Search and Seizure in Which Federal Officers Participated.

The Court of Appeals in apparent deference to a request by appellee, never decided this question, and bypassed it by *assuming* the existence of probable cause to hold a valid arrest. We submit this question was and is necessarily presented in this case. We further submit that the facts show a clear case of federal participation under the rules of the applicable decisions as set out in appellant's opening brief, Argument I-B and the following cases therein cited. *Byars v. United States*, 273 U. S. 28, 71 L. Ed. 520; *Gambino v. United States*, 275 U. S. 310, 72 L. Ed. 293; *United States v. Irwin*, 86 Fed. Supp. 362; *United States v. Butler*, 156 F. 2d 897; *Lowrey v.*

United States, 128 F. 2d 477; *Fowler v. United States,* 62 F. 2d 656; *United States v. Silbert,* 150 Fed. Supp. 456; *Southerland v. United States,* 92 F. 2d 305.

Accordingly, the failure to suppress Exhibit 1-A on the motions and its admission into evidence at the trial was erroneous and in violation of the Fourth and Fifth Amendments.

IV.

The Conviction of Your Petitioner Was Obtained by the Erroneous Failure to Suppress and the Admission Into Evidence of Exhibit 1-A Which Was Obtained From Your Petitioner in Violation of the Fourth and Fifth Amendments by an Illegal Search and Seizure, Under Circumstances Constitutionally Requiring Its Exclusion Whether or Not There Was Direct Federal Participation.

Heretofore this Court has announced a rule that where evidence is obtained in an illegal search and seizure by state officers in which federal officers participate, the evidence would be treated, for the purpose of a motion to suppress, as though the acts providing the evidence were the acts of federal officers. *Byars v. United States,* 273 U. S. 28, 71 L. Ed. 520. While under this rule the judicial question became one of defining participation to ensure the constitutional safeguards, the federal enforcement question became one of how to use state officers as instruments of general warrant or writs of assistance, without falling within the judicial definition of participation; that is, of working within the so-called "silver-platter" doctrine.

Various devices, procedures, techniques and arrangements have been evolved by the federal enforcement officers. Some of these have been judicially considered

with the Courts on one hand saying, "No exclusion, it is a 'silver-platter' situation," or, on the other hand saying, "Exclusion, it is a case of federal participation."

Meanwhile this Court, while dealing with wiretapping not within the Fourth Amendment, (*Benanti v. United States*, 355 U. S. 96, 2 L. Ed. 2d 126, 78 S. Ct. 155, note 10) indicated it was still an open question whether evidence illegally obtained by state officers would be admissible in a federal court despite the Fourth Amendment.

Recently this Court has granted certiorari in *Rios v. United States*, (No. 52 Supreme Court Docket) and *Elkins v. United States*, (No. 126 Supreme Court Docket) to review the precise question that was said to be left open by the Court in a footnote in *Benanti v. United States, supra.*

Although we feel this case is resolvable under the participation cases, without reaching the "silver platter" issue of the *Elkins* and *Rios* cases, we do herewith submit that the facts of this case and the patent device here used by the enforcement officers, irrespective of any question of participation, contravenes the purpose and the mandate of the Fourth Amendment in such a way as to point out the need for the total rejection of the "silver platter" doctrine.

We submit that the serious federal question now before the Court for settlement, should include the enforcement techniques of this case as well as the enforcement devices of the *Rios* and *Elkins* cases to the end that a full and complete consideration of the so-called "silver-platter" question will ensue within both the ambit of the Fourth Amendment and the supervisory power of this Court under the *McNabb* rule.

Conclusion.

For each and all of the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Mary Helen Burton, Appellant, vs. United States of America, Appellee. No. 16,093. Nov. 16, 1959.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Orr, Barnes and Hamley, Circuit Judges.

Barnes, Circuit Judge:

This is an appeal from a conviction of the receipt, concealment and transportation of eighty-eight grains of illegally imported heroin. 21 U. S. C. § 174. Appeal is timely and this court has jurisdiction under 28 U. S. C. § 1291.

We first adopt, with slight changes, the introductory statement of appellant's opening brief which is as follows:

"Defendants Edwin Stewart and Mary Helen Burton were originally indicted in May of 1957, under Case No. 25917, of one count of violation of Title 21, § 174 of the United States Code, the illegal concealment and transportation of narcotics. Subsequently a motion to suppress was duly filed, and oral proceedings had before the Hon. Leon Yankwich . . . which motion was denied and the case transferred to the courtroom of the Hon. Harry Westover where the motion to suppress was again urged and additional evidence presented.[1]

Thereafter, in October of the same year, each of the defendants were reindicted under Case No. 26268 of two

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[1]This second motion to suppress was denied, as was the third (or perhaps continued) motion hereinafter mentioned.

counts of narcotics violation, and the original indictment under Case No. 25917 was dismissed. After the filing of the new indictment over objection of defendants, an additional motion to suppress was urged and denied. Subsequently at the time of trial, the evidence which was the subject of the various motions to suppress was admitted over objection of defendants. This case . . . was tried without a jury [before the Hon. Harry Westover], the court finding the defendant Edwin Stewart not guilty of all counts, and the defendant Mary Helen Burton guilty of Count I and not guilty of Count II.

The government at the time set for the sentencing of the defendant in January of 1958, served upon the defendant, Mary Helen Burton, in open court, an unverified information alleging a prior offense. After various motions and objections on the part of defendant, said defendant was sentenced to ten years in the federal penitentiary, hence this appeal. The fundamental questions presented by this appeal are as follows:

1. Whether there was an illegal search and seizure of the narcotics presented as evidence in the case against appellant, Mary Helen Burton.

2. Whether federal agents were connected with and a party to the illegal search and seizure.

3. Whether appellant's constitutional rights under the Fourth, Fifth, Sixth and Eighth Amendments of the United States Constitution were infringed upon by the failure to allege the prior offense in the original indictment.

4. Whether the court had the discretion to deny the prior conviction and sentence the defendant to five years imprisonment instead of ten years imprisonment as the court indicated it desired to do."

We next adopt the statement of facts made by appellee:

"On May 2, 1957, two deputy sheriffs employed by the County of Los Angeles and assigned to the Narcotic Detail, conducted an investigation of the appellant. At about 10:05 P.M., the officers observed the appellant and one Edwin Stewart, co-defendant of the appellant, arrive in an automobile and park in the driveway of 733 East 55th Street. The officers observed the defendants enter a garage apartment located on the rear lot and return to the vicinity of their car in approximately twenty minutes. When the defendants walked down the driveway towards the automobile in which they had arrived, the officers asked them to stop, at which time Stewart made several lunges toward the far corner of the driveway. Immediately after yelling 'Police Officers. Stop.' the officers observed the appellant and noticed that she had her hand underneath her coat and that a small object fell from the coat to the ground.

The defendant Stewart was seized and appellant was ordered to place her hands on the hood of the automobile. Thereafter one of the officers retrieved a small manila envelope from the ground, Exhibit 1-A, which later was identified to contain eighty-eight grains of heroin.

The defendants thereafter were booked in the Los Angeles County jail for violations of both the Federal Narcotics Law and the narcotics laws of the State of California.

Appellant denied owning, leasing or renting the premises at 733 East 55th Street and also denied that the object recovered from the ground was hers."

We prefer to define the issues here involved to be as follows:

1. Was there an illegal search and seizure of narcotics by the officers?

2. Assuming there was an illegal search and seizure, were the federal narcotics agents connected with and party to such illegal search and seizure?

3. Assuming there was an illegal search and seizure, does appellant have such a possessory interest in the substance seized so as to entitle her to move to suppress?

4. Was it error for the government to fail to plead the prior offense in the original information?

5. Was it error for the trial court to impose a sentence of ten years, believing it had no discretion to give a lesser sentence?

Points 1, 2 and 3.

It is obvious that we need answer questions two and three only if question one is answered in the affirmative. If there was no illegal search and seizure, points one, two and three are disposed of.

Appellant's brief states the fact of illegality as a fact, and that there seems "little doubt" of the illegal search and seizure. But the narcotics introduced in evidence (eighty-eight grains of heroin) were picked up from the ground where appellant Burton was seen to drop them. Appellant Burton and co-defendant Stewart were thereafter searched, but no narcotics nor any other evidence was found on them. The only narcotics of which defendant Burton was charged and found to be guilty of receiving, concealing and transporting were the eighty-eight grains of heroin found in the brown envelope seen to fall from beneath the coat of defendant Burton. At that time the defendant Burton had her hand beneath her coat. If we assume the only search subsequent to the arrest was

illegal, it did not and could not prejudice defendant Burton. It produced no evidence against her; it bore no fruits.

We note that there is no error specified relating to a lack of probable cause for appellant's arrest. While the question of lack of probable cause for arrest is casually mentioned by both appellant[2] and appellee,[3] the case below was apparently tried on the assumption that probable cause for the arrest existed.

Appellant relies strongly on Williams v. United States, D. C. Cir., 1956, 237 F. 2d 789. There it seemed clear that the person illegally arrested was, sometime later, about to be searched. "The arrest was illegal because without a warrant, without probable cause, and without other validating circumstances. The government does not seriously contend otherwise." 237 F. 2d at 789.

The Williams case, of course, is not controlling on this Court. But even to make it persuasive, we would be required to find (a) an illegal arrest; (b) an illegal search, or the threat thereof; (c) evidence introduced against appellant as a result or product of (a) and (b). All three essential elements are missing on the record before us.

Here there was admittedly no warrant for arrest. But lack of "probable cause" or "reasonable grounds" for the

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[2]Appellant states: "Without attempting to repeat the evidence as outlined in the Statement of Facts, suffice it to conclude that the officers did not have reasonable or probable cause to effect the arrest of defendant and subsequent search and seizure of the narcotic substance." (Appellant's Brief, p. 20.)

[3]"The law, in its wisdom, precludes the use of evidence obtained by arrests made without what the law describes as probable cause.

"However, the law grants the privilege of suppressing such evidence only to those bold enough to acknowledge their interest therein. In addition, the law renders admissible in any event evidence discarded and abandoned by defendants." (Appellee's Brief, p. 13.)

arrest was not developed by appellant, if it existed at all. The government argues that lack of probable cause for arrest or search is unimportant and immaterial because appellant is in no position to claim an interest in the evidence abandoned by her, and we agree.

Appellant asks us to follow Williams, *supra*, and hold that despite a disclaimer of ownership in the heroin, and a denial that she had ever possessed it, she somehow obtained a standing to raise an objection, based on her interest therein, because other witnesses testified she dropped the heroin. We decline to follow the Williams case in this regard. We approve the view of Judge Learned Hand expressed in Connolly v. Medalie, 2 Cir., 1932, 58 F. 2d 629 at 630:

"Men may wince at admitting that they were the owners, or in possession, of contraband property; may wish at once to secure the remedies of a possessor, and avoid the perils of the part; but equivocation will not serve. If they come as victims, they must take on that role, with enough detail to cast them without question. The petitioners at bar shrank from that predicament; but they were obliged to choose one horn of the dilemma."

And see, Baskerville v. United States, 10 Cir., 1955, 227 F. 2d 454; Gaskins v. United States, D. D. Cir., 1955, 218 F. 2d 47; Scroggins v. United States, D. C. Cir., 1952, 202 F. 2d 211; Kwong How v. United States, 9 Cir., 1934, 71 F. 2d 71.

With respect to the eighty-eight grains of heroin marked Exhibit 1-A, we find no evidence of illegal search and seizure, and in fact we find no evidence of any search with respect to Exhibit 1-A; and no seizure of it, within

the legal meaning of that term.[4] The heroin (Ex. 1-A) was abandoned property. Hester v. United States, 1924, 265 U. S. 57; Haerr v. United States, 5 Cir., 1957, 240 F. 2d 533; Lee v. United States, D. C. Cir., 1954, 221 F. 2d 29.

There being in fact and law no search and in law no seizure of the evidence by which appellant was convicted, there could be no illegal search or seizure involved.

Thus we find the first three issues raised by appellant, as they are re-defined above, to lack merit.

POINT 4.

Was it error for the government to fail to plead the prior offenses in the original information?

The statute cited by appellant (68A Stat. 860 (1954), 26 U. S. C. § 7237 (1958)) provides in part:

"After conviction (but before pronouncement of sentence) of any offense . . . [particularly described] . . ., the court shall be advised by the United States attorney whether the conviction is the offender's first or a subsequent offense. If it is not a first offense, the United States attorney shall file an information setting forth the prior convictions. The offender shall have the opportunity in open court to affirm or deny that he is identical with the person previously convicted. If he denies the identity, sentence shall be postponed for such time as to permit a trial before a jury on the sole issue of the offender's identity with the person previously convicted. If the of-

[4]This statement, of course, does not apply to the heroin and paraphernalia used in connection with heroin addiction found in the premises thereafter searched by the officers, but not introduced in evidence against the appellant on the count under which she was convicted.

fender is found by the jury to be the person previously convicted, or if he acknowledges that he is such person, he shall be sentenced as prescribed . . . ."

Appellant urges that punishment for a second offense is authorized only if there has been an acknowledgement of the fact by the defendant or a determination by a jury; that the determination of the fact by a judge will not suffice; that the determination of the fact by the jury requires "dead time" to be served; that such dead time may not be considered by the court in sentencing, and hence (a) defendant has been placed twice in jeopardy, (b) there has been a violation of due process, and (c) defendant has suffered cruel and unusual punishment; and hence that the statute is unconstitutional.

We have heretofore decided that the portion of the Boggs Act herein attacked is constitutional. Sherman v. United States, 9 Cir., 1957, 241 F. 2d 329 at 335. The facts sought to be established by the procedure "after conviction" go solely to the question of punishment. Graham v. West Virginia, 1912, 224 U. S. 616; Beland v. United States, 5 Cir., 1942, 128 F. 2d 795. The "dead time" is no greater than or different from "dead time" lost during the delay occasioned by the obtaining of a probation report on any convicted prisoner. There was no second trial of appellant. We find no merit in this point.

POINT 5.

Was it error for the trial court to impose a sentence of ten years believing it had no discretion to give a lesser sentence?

Section 174 of 21 U. S. C. of which appellant was convicted requires a minimum sentence of ten years.[5] Unlike the state courts of California where certain discretion lies with the trial court judge to strike "priors," or find them proved or not proved, this discretion does not exist under the law the Congress has seen fit to enact for the guidance of federal court judges. We can debate the merits of the matter, but we cannot legislate. No cases are cited by appellant on this point, and we find no merit in it.

The judgment of conviction is *affirmed.*

(Endorsed:) Opinion. Filed Nov. 16, 1959.

Paul P. O'Brien, Clerk.

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[5] "For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954) the offender shall be imprisoned not less than ten or more than forty years . . . ." 35 Stat. 614 (1909), as amended 21 U. S. C. § 174 (1958).

APPENDIX B.

United States Court of Appeals for the Ninth Circuit.

Mary Helen Burton, Appellant, vs. United States of America, Appellee. No. 16093.

Judgment.

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment.

Filed and entered: November 16, 1959.

Paul P. O'Brien, Clerk.

APPENDIX C.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Thursday, January 7, 1960.

Before: Orr, Barnes & Hamley, Circuit Judges.

Order Denying Petition for Rehearing.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed December 29, 1959, and within time allowed therefor by rule of Court, and valid extension thereof, for a rehearing of the above cause, be, and hereby is denied.

APPENDIX D.

Amendment IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized..

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

21 U. S. C. 174.

21 U. S. C. 174 provides in pertinent part as follows:

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States.

shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under Section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

(Amendment by act of July 18, 1956, as effective on July 19, 1956.)